IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED
October 11, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30400

RELEASED
October 11, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DEBORAH H. JIVIDEN,
Petitioner Below, Appellant,

V.

DALE R. JIVIDEN,
Respondent Below, Appellee.

Appeal from the Circuit Court of Kanawha County
Honorable Tod J. Kaufman, Judge
Civil Action No. 00-D-1638

AFFIRMED

Submitted: September 18, 2002
Filed: October 11, 2002

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The Opinion of the Court was delivered PER CURIAM.

JUSTICES STARCHER AND ALBRIGHT dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syllabus point 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

2. "One of the purposes of West Virginia Rule of Civil Procedure 60(b) is to provide a mechanism for instituting a collateral attack on a final judgment in a civil action when certain enumerated extraordinary circumstances are present. When such extraordinary circumstances are absent, a collateral attack is an inappropriate means for attempting to defeat a final judgment in a civil action." Syllabus point 2, *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996).

3. "An appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." Syllabus point 3, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

Per Curiam:

Deborah H. Jividen, appellant/defendant below (hereinafter referred to as "Ms. Jividen"), appeals from an order of the Circuit Court of Kanawha County denying her Rule 60(b) motion. Ms. Jividen seeks to have the circuit court set aside a provision in the divorce decree that awarded her former spouse, Dale Ray Jividen, appellee/plaintiff below (hereinafter referred to as "Mr. Jividen"), the home the couple resided in during the marriage. Specifically, Ms. Jividen seeks to have the home declared marital property for the purpose of having it sold and the proceeds equitably distributed. After reviewing the briefs and listening to oral arguments, we affirm the circuit court's denial of relief.

I.

FACTUAL AND PROCEDURAL HISTORY

Prior to the Jividens' marriage, Ms. Jividen resided in a home owned by her son, Richard Harris.[1] At some point, Mr. Jividen moved into the residence with Ms. Jividen. On April 16, 1999, shortly after Mr. Jividen moved into the home, Mr. Jividen paid Mr. Harris $13,000.00 to purchase the residence. Prior to the preparation and recording of a deed for such property, Ms. Jividen and Mr. Jividen were married on June 24, 1999. On September 15, 1999, a deed to the home was duly recorded. The deed stated that the home was being conveyed to Ms. Jividen and Mr. Jividen, as husband and wife, and as joint tenants with right

[1]Where the sparse appellate record does not provide sufficient information to guide our resolution of this matter, we have relied upon the parties' representations in their briefs to this Court.

of survivorship.

On August 24, 2000, Mr. Jividen filed for a divorce on the grounds of irreconcilable differences.[2] During proceedings before the family law master, evidence was introduced indicating that when Mr. Jividen purchased the home, it was agreed that the deed would be written to convey the home solely to Mr. Jividen. Evidence was also presented to demonstrate that, without Mr. Jividen's knowledge, Ms. Jividen contacted the lawyer preparing the deed. She instructed the lawyer to include her name on the deed along with Mr. Jividen's.[3]

The family law master issued a recommended decision on June 27, 2001. In that decision, the family law master recommended that the parties be divorced, that Mr. Jividen be given exclusive possession and ownership of the home, and that Ms. Jividen be awarded $1,000.00 for improvements she made to the home during the parties' marriage.

Ms. Jividen, who was represented by counsel, failed to file a petition for review to the recommended decision of the family law master. On June 23, 2001, the circuit court entered an order adopting the recommendations of the family law master. Ms. Jividen did not appeal the circuit court's decree granting a divorce and resolving all equitable distribution

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[2]No children were born of the marriage.

[3]During oral argument, counsel for Ms. Jividen sought to dispute the manner in which Ms. Jividen's name appeared on the deed. However, the facts set forth herein are consistent with those contained in the final divorce order.

issues including disposition of the home.[4] Instead, on September 24, 2001, Ms. Jividen faxed[5] to the circuit court a motion under Rule 60(b) of the West Virginia Rules of Civil Procedure, seeking to challenge the divorce decree's disposition of the home.[6] On October 26, 2001, the circuit court issued an order denying relief. From this order, Ms. Jividen now appeals.

II.

STANDARD OF REVIEW

This appeal relates directly to the order of the circuit court denying Ms. Jividen's

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[4]During oral argument, counsel for Ms. Jividen indicated that Ms. Jividen did not appeal this order due to confusion between Ms. Jividen and her trial counsel.

[5]An original copy of the motion was filed on September 25, 2001.

[6]Rule 60(b) of the West Virginia Rules of Civil Procedure provides, in pertinent part,

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged , or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Rule 60(b) motion. We have held that "[a] motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R. C. P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syl. pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974). This Court also noted, in Syllabus point 4 of *Toler* that "[i]n reviewing an order denying a motion under Rule 60(b), W. Va. R. C. P., the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner." 157 W. Va. 778, 204 S.E.2d 85. With these standards in mind, we will consider the parties' arguments.

III.

DISCUSSION

Ms. Jividen argues in this appeal that (1) it was error to find that Mr. Jividen intended to acquire the house solely in his name; (2) it was error to find that the fair market value of the house was $13,000.00; and (3) it was error not to provide equitable distribution of the value of the house.[7] We are sympathetic with Ms. Jividen on each of these issues.

[7]The family law master made specific findings relating to the parties' intent regarding title to the home and explaining why a true fifty percent equitable distribution of the property would not be appropriate in this case. Additionally, the only evidence presented to the family law master regarding the value of the house was the $13,000.00 purchase price. Ms. Jividen produced no evidence before the family law master regarding the property's value. *See* Syl. pt. 2, in part, *Kline v. McCloud*, 174 W. Va. 369, 326 S.E.2d 715 (1984) ("The price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true (continued...)

However, those issues were not proper for consideration by the trial court under a Rule 60(b) motion.

In *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996), Justice Cleckley noted that

> the weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit. . . . In other words, a Rule 60(b) motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled.

Powderidge, 196 W. Va. at 705-06, 474 S.E.2d at 885-86 (footnote and citations omitted). Moreover, "[i]t is established also that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original [proceeding]." *Id.*, 196 W. Va. at 706, 474 S.E.2d at 886.

> Our cases are clear.
>
> Rule 60(b) . . . provides a basis for relieving a party from a final judgment upon the following grounds: (1) mistake, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied or vacated; or (6) any other reason justifying relief.

Syl. pt. 1, in part, *Savas v. Savas*, 181 W. Va. 316, 382 S.E.2d 510 (1989). Therefore "'[a]

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[7](...continued)
and actual value.").

circuit court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it.'" *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 472-73, 513 S.E.2d 692, 699-700 (1998) (quoting *Powderidge*, 196 W. Va. at 706, 474 S.E.2d at 886). We additionally held, in Syllabus point 2 of *Hustead ex rel. Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996), that:

> One of the purposes of West Virginia Rule of Civil Procedure 60(b) is to provide a mechanism for instituting a collateral attack on a final judgment in a civil action when certain enumerated extraordinary circumstances are present. When such extraordinary circumstances are absent, a collateral attack is an inappropriate means for attempting to defeat a final judgment in a civil action.

Ms. Jividen failed to establish before the circuit court any of the grounds for relief under Rule 60(b). Consequently, the only way in which the circuit court could have addressed the substance of her claims was through Ms. Jividen's filing of an exception to the family law master's recommended decision. Ms. Jividen failed to file any pleadings before the circuit court objecting to the recommendations of the family law master.

In addition to being foreclosed from bringing the substance of her assignments of error to the trial court under Rule 60(b), Ms. Jividen is also foreclosed from raising those issues before this Court. Our law is quite clear in holding that "[a]n appeal of the denial of a Rule 60(b) motion brings to consideration for review *only* the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." Syl. pt. 3, *Toler*, 157 W. Va. 778, 204 S.E.2d 85. *Accord Law v. Monongahela Power Co.*, 210 W. Va.

549, 562, 558 S.E.2d 349, 362 (2001) (per curiam) (Davis, J., dissenting) (internal quotations and citation omitted); Syl. pt. 2, *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 541 S.E.2d 1 (2000) (per curiam). In other words, for this Court to reach the substance of the issues presented by Ms. Jividen, her "lawyer should have appealed the judge's [divorce] order[.]" *Rose*, 208 W. Va. at 415-16, 541 S.E.2d at 10-11 (Starcher, J., concurring). Simply put, "Rule 60(b) is not a substitute for an appeal." *Nancy Darlene M. v. James Lee M.*, 195 W. Va. 153, 156, 464 S.E.2d 795, 798 (1995).

We need not consider this matter further. Ms. Jividen provided the circuit court with no basis under Rule 60(b) for disturbing the final divorce judgment. Therefore, the circuit court did not abuse its discretion in denying the motion. *See Intercity Realty Co. v. Gibson*, 154 W. Va. 369, 377, 175 S.E.2d 452, 457 (1970) ("Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." (citation omitted)). Accordingly, we affirm the circuit court's ruling.

IV.

CONCLUSION

The circuit court's order denying relief under Rule 60(b) of the West Virginia Rules of Civil Procedure is affirmed.

Affirmed.